BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON LALLMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,420
U.S.D. 501	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the August 31, 2007 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to prove that her injuries and need for treatment were the result of an accident arising out of and in the course of her employment.

Claimant appeared by her attorney, Mitchell D. Wulfekoetter of Topeka, Kansas. Respondent appeared by its attorney, Larry G. Karns of Topeka, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held August 29, 2007, with attached exhibits; and the documents filed of record in this matter.

ISSUES

1. Does the Board have jurisdiction to consider this matter on appeal from a preliminary hearing?

2. What is the record considered on this appeal?

3. Are claimant's injuries and need for treatment the result of an accidental injury which arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

Claimant, a substitute teacher throughout the U.S.D. 501 school district, was injured on May 10, 2007, while working for U.S.D. 501 Substitute Services.

Claimant was teaching a physical education class at Topeka High School. She was giving final instructions to the students for their final exam, when, while looking down at a clipboard, she was struck in the face by a dodge ball. The impact knocked her glasses off of her face, and the clipboard fell out of her hand. Both the glasses and the clipboard fell to the floor.

The ball struck claimant's face in the right cheekbone, lip and eye area. Claimant acknowledged that it hurt, it stung, and that it jolted her neck. Her face was swollen, and her glasses were bent.

Steven Grammar, the associate principal athletic director, saw claimant shortly after the May 10 incident occurred. He testified that claimant was very upset, stating that she had been hit with a ball. Mr. Grammar initially indicated that claimant said the ball struck her in the left temple. When asked if claimant said the ball struck her anyplace else, Mr. Grammar responded "no".

Claimant refused treatment by the school nurse, stating that she was fine. Mr. Grammar asked her about filling out an incident report, but claimant said she could not fill out an incident report because she could not see without her glasses.

When Mr. Grammar was asked what claimant told him as far as where she was hit, Mr. Grammar pointed to the left temple. He remembers that it was in the temple area, although it could have been the right temple. He testified that claimant pointed to the temple.

Claimant testified that when she went home that night, she had a very bad headache and her teeth hurt, and she was having pain in her jaw and neck.

Claimant has had a bridge, encompassing six teeth on her upper jaw, since the age of 9. Her dentist is Jack E. Ferguson, D.D.S. The last time she saw Dr. Ferguson prior to the May 10 event was in December 2006, seeing him at that time for a general checkup and cleaning. Dr. Ferguson did all of the prior work on claimant's bridge. Claimant's bridge was not loose at the time of the December 2006 visit. Claimant had had her bridge replaced two or three times before. The last time she had her bridge replaced was more

than 4 or 5 years ago. She had not had any problems with it since then until May 10. Claimant testified that the problems with her bridge started on May 10, after the impact.

Respondent contends that the ball was spongy and that it is much like a nerf ball. In respondent's brief, it is stated that the ball weighed 4.2 ounces.[1]

The next morning, claimant called Casey Crawford at Substitute Services and was told to go to Dale Garrett, M.D. That same day (May 11), claimant went to Dr. Garrett. Respondent contends that Dr. Garrett's May 11 record states that claimant was hit in the "head" with the ball. However, in Dr. Garrett's May 11 report, under the history, it states that claimant was hit in "the right side of the face with a ball." Dr. Garrett's initial diagnosis was a mild contusion to the right side of her face.[2]

After being hit in the face by the ball, claimant noticed that the bridge in the upper right side of her jaw was loose. Claimant testified that she talked to Dr. Garrett about her teeth, including the fact that the bridge was loose, and Dr. Garrett told claimant to go to a dentist. Over the next few days, the bridge got progressively looser.

Claimant saw Dr. Garrett on a total of five occasions. According to Dr. Garrett's records of May 11, May 14, May 18, May 31 and June 7, 2007, Dr. Garrett told claimant to see a dentist for a bite guard. In his May 31 and June 7 reports, Dr. Garrett mentions non-occupational bite guard. Claimant had not used a mouth guard (bite guard) in the year before this event occurred. Dr. Garrett released claimant from his care on June 7.

Claimant testified that she called Sandra Deines, workers compensation administrator for U.S.D. 501. Claimant described to Ms. Deines what was happening. Ms. Deines told claimant to go to her own dentist, which was Dr. Ferguson.

The first time claimant saw Dr. Ferguson following the May 10 incident was on May 29, 2007. She also saw Dr. Ferguson on June 5 and June 19, 2007. Dr. Ferguson wrote, in a letter dated July 12, 2007, that claimant was seen in his office on May 29, and that she "reported being hit in the face by a dodgeball."

In that July 12 letter, Dr. Ferguson opined that the ball, identified as a "Voit Allaround" ball, is of sufficient hardness to have caused trauma to claimant's jaw. It is significant that Dr. Ferguson had the opportunity to examine the ball.

Claimant was seen by Phillip L. Baker, M.D., on August 7, 2007. Dr. Baker, in his report of August 13, 2007, opined that the ball could not cause an injury such as claimant

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[1] Respondent's Brief at 5.

[2] P.H. Trans., Cl. Ex. 1.

is alleging.[3] Claimant's attorney stated that one of the problems in this case is that there is a fracture in a bone in the bridge area. Claimant argues that Dr. Baker is not qualified to give such an opinion as he does not treat bones in the mouth.

Respondent argues that when claimant was seen by a chiropractor on May 16, 2007, she reported that she was hit in the "right temporal region with a dodge ball."[4] Claimant was not aware that that is what she reported to the chiropractor.

In her statement to the school board dated June 10, 2007, claimant wrote that "several of the students were sitting on the floor listening to my instructions for their final exam when I was hit in the head by the dodge ball."[5]

Claimant was referred by Dr. Ferguson to oral surgeon John P. Tanner, D.D.S., M.D., of the Facial Surgery Group. In the answers to the TMJ Questionnaire (which claimant completed on July 24, 2007, prior to seeing Dr. Tanner), claimant wrote "I was hit in the head by a dodgeball."[6] On the Patient Information Sheet dated July 24, 2007, claimant wrote, "I was hit in the head with a dodge ball. I was hit on the right side of my face/head."[7] In his July 24, 2007 letter, Dr. Tanner wrote that claimant told him she "was struck in the face by a ball."[8] Claimant's attorney wrote Dr. Tanner on August 22, 2007. In that letter, Dr. Tanner was asked to respond to whether claimant's symptoms and diagnosis and need for treatment were causally related to the ball hitting her in the face. The response, signed by Dr. Tanner and dated August 25, 2007, was answered in the affirmative.

Respondent placed into the record the Affidavit Of Terrence M. Babilla, General Counsel of Sport Supply Group since March 1995. In his affidavit, Mr. Babilla stated that, since March 1995, he has handled all of Sport Supply Group's product liability claims. During that time, he was unaware of anyone being injured by the Voit Allaround Ball.[9]

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[3] P.H. Trans., Resp. Ex. E.

[4] P.H. Trans., Resp. Ex. A.

[5] P.H. Trans., Resp. Ex. B.

[6] P.H. Trans., Resp. Ex. C.

[7] P.H. Trans., Cl. Ex. 1.

[8] P.H. Trans., Cl. Ex. 1.

[9] P.H. Trans., Resp. Ex. I.

Regarding the ball that struck claimant, Mr. Grammar stated that they never had an injury from the use of that type of ball. Claimant's biggest concern when Mr. Grammar was talking to her on that day, after the accident happened, was that her glasses had been broken. She also was embarrassed.

The ALJ had the opportunity to hold and examine the ball at the preliminary hearing. Additionally, claimant took the ball to Dr. Ferguson and to Dr. Tanner. Both Dr. Ferguson and Dr. Tanner considered the ball when giving their opinions about what caused claimant's problems.

Dr. Ferguson referred claimant to J. Michael Randall, D.D.S. A report from Dr. Randall dated August 28, 2007, reflects a history of being "hit in the mouth/face by a dodgeball." In that report, Dr. Randall opined that based on the history and clinical examination, he does indeed believe claimant's trauma from May 10, 2007, contributed to the pulpal pathosis of claimant's teeth.

PRINCIPLES OF LAW AND ANALYSIS

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[10]

This Board Member must first determine whether the Board has jurisdiction to consider this matter on appeal from a preliminary hearing. There is no dispute that claimant was struck by a dodge ball while performing her job duties for respondent. Respondent argues the issue in dispute is whether claimant is entitled to medical treatment, which, under K.S.A. 44-534a, would not be a jurisdictional question. However, the real question addressed by the ALJ is whether claimant's need for medical treatment stems from an accident suffered while working for respondent. Thus, the question becomes, did claimant suffer an accidental injury arising out of and in the course of her

[10] K.S.A. 44-534a(a)(2).

employment which resulted in an injury to her jaw sufficient to cause the damage to her preexisting bridge? This is an issue over which the Board takes jurisdiction on appeal from a preliminary hearing.

The Board is limited under K.S.A. 2006 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

The record listed in the brief of claimant includes only the preliminary hearing transcript, with its attached exhibits. The record listed by respondent also includes a deposition taken of claimant on August 13, 2007. That transcript is not listed in the Workers Compensation Docket Report in this matter and was not contained in the file provided to the Board by the ALJ. In a telephone conference held November 6, 2007, between the undersigned Board Member and the attorneys for both claimant and respondent, it was determined that the deposition was listed as a Discovery Deposition at the time it was taken. There is nothing in the preliminary hearing transcript to indicate that respondent requested that deposition be made a part of the record for the purposes of this appeal. The Board is limited to consider only that information initially provided to an administrative law judge. The Board does not accept evidence not originally provided to an administrative law judge, absent a stipulation by the parties, which is not present in this case. Therefore, the Discovery Deposition taken of claimant on August 13, 2007, is not a part of this record and will not be considered by this Board Member during the review of this appeal.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[11]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[12]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[13]

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[11] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[12] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[13] K.S.A. 2006 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[14]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[15]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[16]

Dr. Ferguson has been claimant's dentist for a substantial amount of time. He alone, of the health care providers expressing a causation opinion in this matter, saw claimant both before and after the accident. Dr. Ferguson also had the opportunity to examine the ball in question. He believed that the ball was of sufficient hardness to cause the trauma to claimant's jaw. Dr. Ferguson's opinion, backed by his long professional relationship with claimant, carries great weight in this matter. But it does not stand alone. Dr. Randall, a micro-endodontics specialist, also agreed that the trauma of May 10, 2007, to claimant's face contributed to the pulpal pathosis of her teeth. Finally, Dr. Tanner, a dentist and medical doctor who specializes in facial surgeries, determined that the "disruption of the alveolar crest below the bridge" is the result of the facial trauma suffered by claimant on May 10.[17] While Dr. Baker may be a fine orthopedic surgeon, his specialty is not teeth or facial injuries. As such, his opinion alone is not sufficient to outweigh those of the above discussed experts. This Board Member finds that claimant has proven that

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[14] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[15] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[16] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[17] P.H. Trans., Cl. Ex. 1.

her need for treatment is the result of the injuries suffered on May 10, 2007, while teaching for respondent. Therefore, the Order of the ALJ is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Order of the ALJ is reversed and this matter remanded for additional proceedings consistent with this Order.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated August 31, 2007, should be, and is hereby, reversed and remanded to the Administrative Law Judge for additional proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant
Larry G. Karns, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge

[18] K.S.A. 44-534a.